Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1979

No. 79-1309

Carl Michael Seibert,

Petitioner

vs.

D. T. Baptist, District Director of Internal Revenue Service, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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IN THE

Supreme Court of the United States

October Term 1979
No. .....

CARL MICHAEL SEIBERT,
PETITIONER,

vs.

D. T. BAPTIST, District Director of
Internal Revenue Service, et al.,
RESPONDENTS.

The Petitioner, Carl Michael Seibert (hereinafter referred to as *"Seibert"*) prays that a writ of certiorari be issued to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit as entered on May 3, 1979, which affirmed the District Court's dismissal of Seibert's complaint and of July 30, 1979, which reversed the dismissal of Seibert's complaint on only the Fifth Amendment leaving all other issues affirmed by the final denial of November 27, 1979. The judgment and opinions were on that certain appeal styled *Carl Michael Seibert*, Plaintiff-Appellant, *v. Dwight T. Baptist, District Director of Internal Revenue Service, et al.*, Defendants-Appellees, and there assigned No. 78-3007, and assigned docket number CA 77-P-0951-NE in the Federal District Court of Northern Alabama.

OPINIONS BELOW

The opinions of the Court of Appeals have been published at 594 F.2d 423 and 599 F.2d 743. A copy appears in Appendix A and Appendix B hereto attached.

JURISDICTION

The jurisdiction of this Honorable Court is by the judgments entered on May 3, 1979 which affirmed the order of the United States District Court for the Northern District of Alabama granting motion to dismiss, treated as summary judgment, for Dwight T. Baptist, District Director of Internal Revenue Service. A due and timely Suggestion of a Party for Rehearing *En Banc* Rule 35b, or In the Alternative, A Petition for Panel Rehearing, Pursuant to Rule 40, was filed. Seibert also filed Motion to Allow Enlargement of the Length to exceed 15 page limit, which was granted. On July 30, 1979 based on *Davis v. Passman*, 99 S.Ct. 2264, the Supreme Court's reversal of the 5th Circuit *En Banc* decision in *Davis v. Passman*, 571 F. 2d 793 (5th Cir. 1978) the panel of Ainsworth, Godbold and Vance, Circuit Judges, reversed only on Fifth Amendment implied private cause of action, leaving affirmed all other issues. On August 27, 1979, Appellees filed a timely Petition for Rehearing. On September 7, 1979, Appellant filed a timely Petition for Rehearing *En Banc* on remaining issues along with Motion to Allow Enlargement of Petition. On September 21, 1979, the Panel denied Appellee's Petition. On November 9, 1979, the Fifth Circuit issued mandate. In response to the lower court's failure to rule on the Appellant's Petition, the Appellant filed a Motion to Request Reinstatement of

Petition *En Banc*, or in the Alternative Request for Final Denial. On November 27, 1979, the Panel issued final denial (Appendix C). Seibert then filed Request for Recall and Stay of Mandate on December 5, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED UPON PETITION FOR WRIT OF CERTIORARI

I

WHETHER THE PETITIONER HAS AN IMPLIED PRIVATE CAUSE OF ACTION AGAINST FEDERAL OFFICIALS DIRECTLY UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION FOR ALLEGED UNREASONABLE SEIZURES OF PROPERTY AND RIGHTS?

II

WHETHER AN IMPLIED PRIVATE CAUSE OF ACTION EXISTS UNDER THE FIFTH AMENDMENT AGAINST FEDERAL OFFICIALS FOR ALLEGED DENIAL OF DUE PROCESS? THIS QUESTION WAS RESOLVED BY THIS HONORABLE COURT'S DECISION IN *DAVIS V. PASSMAN*, 99 S.CT. 2264, (1979).

III

WHETHER THE PETITIONER CAN INVOKE JURISDICTION UNDER 28 U.S.C. § 2201-2202 WHEN THE COURT HAS PRIOR JURISDICTION UNDER 28 U.S.C § 1331, OR IS PETITIONER BARRED BY THE

PHRASE *"WITH RESPECT TO FEDERAL TAXES"* IN 28 U.S.C. § 2201-2202?

IV

WHETHER THE PETITIONER HAS A CAUSE OF ACTION UNDER 42 U.S.C. § 1983, 1985, AND 1986 AGAINST FEDERAL OFFICIALS WHO ACTED IN CONCERT WITH STATE OFFICIALS TO CONSPIRE TO DEPRIVE PETITIONER OF HIS CONSTITUTIONALLY PROTECTED RIGHTS?

V

WHETHER THE PETITIONER WAS ENTITLED TO PROTECTION OF THE SIXTH AMENDMENT AGAINST AN AGGRESSIVE, LENGTHY, AND PUNITIVE GOVERNMENTAL ACTION, EVEN THOUGH DONE IN THE NAME OF 'FEDERAL TAXES'?

VI

WHETHER THE PETITIONER WAS ENTITLED TO AN *"UNHAMPERED PREPARATION OF A DEFENSE AND THE BASIC PRESUMPTION OF INNOCENCE"* UNDER THE PROTECTION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION?

VII

WHETHER THE INTERNAL REVENUE AGENTS VIOLATED A WELL ESTABLISHED PRINCIPLE OF

CONSTITUTIONAL LAW, THAT IS, THE RIGHT TO DUE PROCESS OR HEARING BEFORE BEING DEPRIVED OF ANY SIGNIFICANT PROPERTY INTEREST? (AS RESERVED BY THIS COURT AT *LAING V. UNITED STATES*, 96 S.CT. 473, 485 N.26 (1976)?

VIII

WHETHER THE MERE FOLLOWING OF PROCEDURE BY FEDERAL OFFICIALS ALLOWS THEM TO DISCHARGE THEIR DUTIES WITH IMPUNITY AGAINST REVIEW OF UNCONSTITUTIONAL CONDUCT? OR WHETHER THE STANDARD SET OUT IN *BUTZ V. ECONOMOU*, 438 U.S. 478, (1978), 98 S. CT. 2894 at 2903, 2905 APPLIES (*"SINCE AN UNCONSTITUTIONAL ACT, EVEN IF AUTHORIZED BY STATUTE, WAS VIEWED AS NOT AUTHORIZED IN CONTEMPLATION OF LAW, THERE COULD BE NO IMMUNITY DEFENSE."*)?

IX

WHETHER FEDERAL OFFICIALS HAVE ABSOLUTE DISCRETION TO TAKE EVIDENCE OR REFUSE TO INVESTIGATE CRIMES WHEN REPORTED TO THEM AND SUPPORTED WITH SUBSTANTUAL EVIDENCE? WHETHER FEDERAL OFFICIALS HAVE ANY MINIMUM STANDARDS OF DUTY IN THEIR JOBS TO THE CITIZENS THEY SERVE? OR MAY THEY ARBITRARILY DISCRIMINATE AGAINST CITIZENS AND BE ABSOLUTELY PROTECTED BY THAT DISCRETIONARY AUTHORITY?

X

WHETHER THE CURRENT JEOPARDY OR TERMINATION ASSESSMENT LAW IS CONSTITUTIONAL, SINCE IT DOES NOT ALLOW FOR IMMEDIATE HEARING AFTER SEIZURE FOR UP TO SIXTEEN DAYS BEFORE THE TAXPAYER MAY BRING ACTION FOR JUDICIAL REVIEW?

XI

WHETHER THE TRIAL COURT ERRED WHEN IT SET ASIDE THE ENTRY OF DEFAULT JUDGMENT AGAINST DAVID R. ARCHER WHEN ARCHER FAILED TO FILE ANY ANSWER OR OTHER DEFENSE TO THE PLAINTIFF'S COMPLAINT? (SINCE PROPER SERVICE WAS MADE, THERE WAS NO MOTION BY DEFENDANT REQUESTING THE COURT TO ENTER THE ORDER, NOR WAS THERE ANY FRAUD UPON THE COURT.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States Article III, Section 2, the Fourth, Fifth, Sixth and Eighth Amendments, and pertinent provisions of Sections 241 and 242 of Title 18; Sections 6212(a), 6213(a), 6331(a) (b), 6851(a) (1), 6861(b) and 7421(a) of Title 26; Sections 1331, 1343(1) (2) (3) (4), 2201 and 2202 of Title 28; and Sections 1983, 1985 and 1986 of Title 42 of the United States Code, appear hereto as Appendix D, E, F, G and H.

The pertinent provisions of Internal Revenue Manual appear hereto as Appendix I.

STATEMENT OF THE CASE

On July 7, 1972, petitioner Carl Michael Seibert was arrested by the Huntsville Police Department for being in possession of a controlled substance. The case was *nolle prosque* by the District Attorney on September 26, 1977 after Seibert produced sufficient evidence of entrapment.

On Friday, July 7, 1972, agents of the Internal Revenue Service were waiting at the Clinton Building in Huntsville, Alabama, for a call from Randall Duck of the Huntsville Police Department to confirm the arrest of Seibert. The phone call was made at about 7:45 P.M. from Seibert's residence to the I.R.S. agents who arrived at the residence as he was being taken away, at about 8:00 P.M.

The I.R.S. agents questioned Seibert's parents about him and the property being seized, which included currency, a currency collection, a Martin D-35 guitar, and an automobile. The agents also asked for and received information concerning the location of Seibert's bank accounts.

On Monday, July 10, 1972, at about 7:30 A.M., Randall Duck and two I.R.S. agents came to see Seibert while he was incarcerated. The agents handed him "notice of seizure" which listed the property being seized under the authority 26 U.S.C. § 6331. They further informed him that the seizures included all rights to property. Seibert was handed a termination of taxable year, pursuant to 26 U.S.C. § 6851, which set his taxes at $6458.00 for the period of January 1, 1972, to July 7, 1972. As required by the termination letter under Section 443 of Title 26, Seibert filed the Form 1040, stating that he had no income for the period of time in question.

The automobile which the I.R.S. agents seized was owned and paid for by Seibert's father, but was purchased for Seibert's use. Seibert and his father made numerous visits with I.R.S. agents in attempt to prove that the automobile seized had been in a bailee-bailor relationship, Seibert being bailee. They presented many checks and documents relating to the automobile, and Seibert offered to sign a release as to his property interest. The offers made by the Seiberts were refused by the I.R.S. agents. One I.R.S. agent, Don Houton, a group supervisor of collections, even went so far as to call Seibert's father a liar over the ownership of the $1300 automobile. (Seibert's father had been a civil service employee for 34 years, during which time he served as a missile designer, Branch Chief in Pershing and later Shillelagh, worked with Safeguard System, and had a top secret N.A.T.O. clearance. He would never have compromised his honor by lying and deeply resented being called a liar by agents of the government he had served.)

In early August of 1972, Seibert received a phone call from Veronica (Ronnie) Potter, whom he had dated in 1970 and 1971. She had heard through mutual friends about his arrest and I.R.S. seizures. He told her that one of the seizures was of the Martin D-35 guitar that she had given him as a gift. After expressing sympathy with Seibert's plight, Ms. Potter hung up. Later that same month, Seibert received a letter from her explaining that she had gone to the I.R.S. and, claiming ownership of the guitar, they had turned it over to her, and she intended to either keep it or sell it. In fact, however, the Martin D-35 had been registered in ***Seibert's name*** since early 1971 at Martin & Co. under the serial #269211.

Shortly thereafter Seibert contacted the I.R.S. agents assigned to his case about the guitar. They told him in so many words that *'it was his problem if he couldn't keep his love life straight, that she had proved ownership and as far as the I.R.S. was concerned it was a matter between Ms. Potter and himself.'*

On or about October 12, 1972, Seibert and his father received notice of auction which was to take place on October 26, 1972. On October, 19, 1972, they filed an action to enjoin the I.R.S. agents from selling the seized property and to compel an explanation as to how the tax was computed as the basis for seizure. They accused the Director's actions as being without foundation or cause and in violation of the United States Constitution.

The U.S. Attorney opposed the action by Seibert on the basis of 26 U.S.C. § 7421(a) and further requested the court dismiss Carl Michael Seibert as a party in the action, and hear only the issue of the ownership of the automobile raised by Carl Edward Seibert (petitioner's father). The Government further requested that a bond be posted on the automobile.

The trial court followed the Government's request and allowed only the issue on the automobile to stand.

After the death of Carl Edward Seibert, executrix Mary Constance Seibert was substituted as plaintiff in that certain civil action styled *Seibert v. D. T. Baptist*, CA No. 72-936-NE (N.D. Ala. 1972).

On November 19, 1973, United States District Court Judge Seyborn Lynn, by preponderence of evidence ruled for the plaintiff.

The collection department of I.R.S. continued to write or call Seibert weekly about paying the alleged tax. Seibert continued trying to convince different branches

and agents to examine evidence compiled to prove his innocence, but they would not turn the first page. His efforts included visits to the Criminal Intelligence Division of I.R.S. with information about illegal income of persons involved in entrapment of others to cover their own actions. Seibert filed 1040 tax forms, but they were always adjusted by the I.R.S., supposedly having been in error. He sent affidavits to the Director of I.R.S. stating that, under penalty of perjury, he had not been in the business of selling drugs or narcotics. He filed amended returns and wrote for conferences in which agent Robert Jones refused to receive or examine any of the evidence offered by Seibert.

On August 7, 1974, Seibert received his *"60 day letter"*, or deficiency notice (some 25 months after the jeopardy assessment seizure) and, on a contingency agreement, hired counsel to file his petition in tax court which requested the return of the U.S. Currency and currency collection, bank account and Martin D-35 guitar. The case was assigned No. 8724-74.

On January 23, 1975, in an appellate conference, with Seibert and his attorney Charles Ray present, the regional counsel and an appellate agent Herb Law stated that they would review some evidence. Seibert gave them some transcripts and was given a receipt, as he requested.

Seibert would not agree to a settlement excluding the guitar and/or currency collection (or its value), and the right to redress violations. Then the case which was set for October 20, 1975, was pulled off the docket by the regional counsel. Seibert's counsel told him the amount of money involved was not worth the time and expense of recovery. Seibert paid the counsel with money borrowed

from his mother, Mary C. Seibert. He then wrote the tax court and had the case redocketed.

On October 19, 1976, in Tax Court, a pre-trial conference was held with regional counsel, Seibert and his new counsel, Warren E. Mason, Jr. At that time, Tax Court Judge William Quealy told Seibert and his counsel that the I.R.S. wished to drop their assessment and that the tax court did not have jurisdiction to entertain the other issues raised in Seibert's petition and that the Federal District Court was the court best suited to hear those remaining issues. Judge Quealy further stated that the regional counsel would agree to Seibert's demand on reservation of rights. Seibert and his counsel inquired into the effect of any statute of limitation. Judge Quealy told them that,

> *"the statute of limitations would start to run from the date of the Tax Court decision which would end the Commissioner's claim against Seibert."*

The decision and stipulation were agreed upon and on January 17, 1977, were filed with the Tax Court.

Warren E. Mason told Seibert that this case would be too costly to litigate and it would involve years of effort, even if he were successful in getting the case to the jury.

Seibert filed his Complaint in the United States District Court for the Northern District of Alabama against the following Federal agents of the Internal Revenue Service in their own individual capacities: D. T. Baptist, Columbus Sanders, Frank W. McCammon. Also included in this action: Gary Patterson, Randall Duck, Steven M. Beshears, Judge David R. Archer, and persons, firms, or corporations whose names are unknown to the plaintiff but will be added by amendment as soon as ascertainment of same is made.

Seibert invoked jurisdiction in the District Court under Sections 1331, 1343, 2201, and 2202 of Title 28; Sections 1983, 1985, and 1986 of Title 42; and the Amendments to the United States Constitution.

Seibert alleged violations of, and conspiracies to violate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Seibert later filed an Amended Complaint and, for clarification, filed an Amendment to the Complaint, but on the latter however, Gary Patterson and Randall Duck were dismissed from the suit by Seibert on motion after an agreement was reached. Seibert was unable to determine the address of Steven Beshears or place upon which service could be made.

Madison County Circuit Judge David R. Archer was also later dismissed from the suit, but Seibert feels it is important to explain at this time his justification for filing suit against him, as well as the circumstances which led to his dismissal.

David R. Archer, before his retirement, was the most reversed judge in the State of Alabama, with some 87% of his cases having been reversed on appeal. He was a Judge who publicly admitted to the media that he was prejudiced against drug offenders, and that all those that came before him regardless of age or prior record, or circumstances, would receive the maximum penalty allowed by law.

The basic reason for the inclusion of David R. Archer in this suit is as follows:

Archer had arranged Seibert's second criminal trial before granting his *writ of error coram nobis*. Judge David Archer gave Seibert two alternatives. One was to surrender and take the original fifteen year prison term.

The other was to be allowed to put in only limited evidence in the *Coram Nobis* proceeding, to waive his right to a trial by jury, and then Archer would enter a verdict of guilty with a ten year sentence in the ensuing trial. The forementioned took place on about September 14, 1974.

An appeal was to be allowed to make up for one lost due to the late filing of transcripts. The *Coram Nobis* was signed but not dated or filed. The motive for Archer's conduct was to aid his friend and Seibert's counsel, to prevent a *prima facie* law suit for negligent mal practice for the events arising from *Seibert v. State*, 53 Ala. App. 229, 298 So. 2d 649; *cert. den* 292 Ala. 748, 298 So. 2d 652 (1974). Sometime later after Seibert agreed to the waiver, the *coram nobis* was dated and filed.

On the *10th* of October, 1974, Seibert was allowed to read the proceedings and trial arranged for the following day, which stated that he was found guilty and sentenced to ten years and from which an appeal was taken. Seibert was then given a copy of his appeal bond which stated that he had been duly convicted on the *11th* of October, 1974. He was told to take the bond to a bondsman by the name of Sims to arrange bond for the trial on the following day. Instead, Seibert arranged for an alternative cash bond from money his Father left to his Mother.

Seibert took the bond to a notary and under seal took an affidavit about what was to take place in that trial the next day. On October 11, 1974, Seibert, under pressure from David Archer, waived his right to trial by jury and was sentenced, just as he stated in his affidavit of October 10, 1974. The Judical Inquiry Commission had stated that it was not in their function to investigate the kind of charge the evidence seemed to indicate and suggested

civil litigation for what appeared to have happened in his case.

For the forementioned reasons, Seibert felt justified in filing suit against David R. Archer. The dismissal of Archer without any hearing should demonstrate why no person should have absolute immunity as in *Pierson v. Ray*, 386 U.S. 547 (1967).

Judge Archer was later dismissed from a default judgment entered by the clerk, and also from this action based on the court's application of *Pierson v. Ray*, 386 U.S. 547 (1967). The lower court in essence acted as counsel for Judge David Archer.

Prior to the defendants' motion to dismiss, or in the alternative motion for summary judgement, being granted. there were some thirty-four pleadings filed, which included interrogatories and requests for production of documents, all of which were denied. On August 11, 1978, the District Court granted the defendants' motion to dismiss, or in the alternative motion for summary judgment (Appendix A). Seibert gave notice of appeal along with a motion for appointment of counsel or alternative counsel in an advisory capacity which were filed on September 5, 1978. On the 6th of September, 1978, the motion for appointment of counsel or alternative counsel was denied.

The appeal was taken and Seibert's Appellant Brief was filed on November 19, 1978. The Appellant Brief did not raise all the issues raised in the Plaintiff's Amended Complaint, but mainly attacked the District Court's opinion on the issues listed as follows:

I(a). Whether Appellant has stated a Constitutional Cause of Action under the Fourth Amendment?

I(b). Whether Appellant has stated a Constitutional Cause of Action under the Fifth Amendment?

II(a). Whether Appellant has stated a statutory Cause of Action ?

II(b). Whether exclusions of Title 28 U.S.C. can be overridden by claims that due process under the Fifth Amendment was violated in order to establish jurisdiction under 28 U.S.C. § 1331?

II(c). Whether an action under the gravamen of this case can be brought under 42 U.S.C. § 1983, § 1985 and §1986?

III. Whether the appellant is entitled to the return of or compensation for his property, which was seized without probable cause and converted without due process of law?

IV. Whether under this democratic system of government there exists the right to judical redress of violations or abuse of governmental delegated powers?

V. Do the Appellees have an affirmative absolute immunity defense?

VI. Whether the defendants have shown good faith, probable cause, or reasonableness for their actions?

VII. Whether Federal District Court committed reversible error by granting summary judgment to appellees when there are disputes of material facts [as not being in compliance with Federal Rules of Civil Procedure, Rule 56(d)]?

On May 3, 1979, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's Opinion of August 11, 1978. Then on Petition for Rehearing filed on May 22, 1979, the Court below reversed only the Fifth Amendment jurisdiction on the basis of *Davis v. Passman*, — U.S. — 99 S.Ct. 2264, 60 L.Ed.2d — 1979. Appellees

Petition for Rehearing was filed on August 27, 1979, but was denied on September 21, 1979. Seibert filed his Petition for Rehearing *En Banc* on September 7, 1979 which requested reversal of the affirmed issues for the reasons set forth herein. Final denial was issued on November 27, 1979.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests to this Honorable Court that Certiorari should be granted pursuant to those reasons hereafter set forth.

I. To ensure the preservation of the 4th Amendment's protection against unreasonable seizures.

The Court below has formed the proposition under the Fourth Amendment, that the mere following of a governmental procedure precludes review of intent, reasonableness, or the due care exercised by Federal officials. The court's opinion in Appendix A at a-18 determined,

> *"in the present case, it appears that appropriate notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in* Bivens."

The determination was made by the improperly applied standard of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed2d 26 78 S.Ct., 240 (1975).

In *Lambert v. California, 355 U.S. 225 (1957) Mr. Justice Douglas reached into civil law to rule for Lambert and defines notice as follows:*

> *"Ingrained in our concept of Due Process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required* ***before property interests are disturbed, before assessments are made, before penalties are assessed."*** [emphasis added]

The *'notice'* given to **Seibert** and said to be sufficient by the court below falls far short of Mr. Justice Douglas' understanding and the usual intent of notice. The Trial Court concluded that the termination notice given to

Seibert was sufficient to preclude a damage claim under the Fourth Amendment, however, Seibert contends that this interpretation of notice is to beckon what has been called *"tacit encouragment of jurisprudentia creativity"* on the most arbitrary of points at the cost of consistency and uniformity. Many of those inconsistent rulings led to what was called by Judge Charles E. Clark, in *Dioguardi v. Druning*, C.C.A. 2d Cir. 1944, 139 F.2d 774 (1944),

> *"another instance of judical haste which in the long run makes waste."*

That waste is most evident in cases such as the present, where the plaintiff is pitted in a procedural contest against Federal counsel, who, with their unlimited time and resources, make a formidable adversary, and, as such, often make the contest not worth the struggle for justice. Even if the plaintiff does prevail after years of struggle, he is left only with the *"hollow remedy"* of *Bivens*. [see *U.S. Code Cong. & Admin. News* at 2790, also *Hernandez v. Lattimou*, 2 Cir. No. 78-2098, decided 6 December, 1979 & *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)].

This Honorable Court should address the formentioned issue to prevent inconsistent rulings on the Fourth Amendment jurisdiction and to prevent the continuation of this erroneous application of *'notice.'*

II. To prevent precluding the Declaratory Judgment Act on the mere basis that the action arose under color of Federal tax law.

The Court below determined that even with a pre-existing cause of action, the court has no jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201-2202 simply on the basis that this cause grew out of conduct done in the name of *'federal taxes.'* (see appendix a-11)

This action does not violate the Anti-Injunctive Act, 26 U.S.C. § 7421(a), which explains the intent and is the counterpart of the phrase *"with respect to Federal Taxes"* in 28 U.S.C. § 2201. The court stated at *Seibert v. Baptist*, 594 F.2d 423, 429 (1979),

> *" . . . even if the declaratory judgment provisions authorized federal jurisdiction . . . its terms specifically exclude the use of declaratory judgments 'with respect to federal taxes.' Clearly then, this court has no jurisdiction . . . by virtue of 28 U.S.C. § 2201-2202."* (appendix A)

This ruling by the lower court is not a *"liberal interpretation," (see Bruhn v. STP Corp.* C. C. Colo, 1970, 312 F. Supp. 903). In *Henshell v. Guilden*, 300 F.Supp. 470 (1969) the court stated as follows in cases involving federal taxes:

> *"Even if Internal Revenue Service had been named as a defendant . . . action did not seek a declaratory judgment 'with respect to Federal taxes' . . . since court was not being asked to declare whether any tax was due or, if so, how much . . . "*

Henderson v. Croom, 403 F.Supp. 665, 667 (1975) added to that proposition, by stating:

> *"This Court is being asked to declare as between the plaintiffs and the defendants whether the plaintiffs are liable . . . (for) penalty which the Internal Revenue Service has undertaken to assess against them. There is ample authority for this Court to enter a Declaratory Judgment on this question."*

The Act of 28 U.S.C. § 2201-2202 is extremely important in cases where there is a grave uncertainty as to the rights of the parties involved in an action. That is especially true if the rights involved are those reserved to the people

against arbitrary governmental deprivation of life, liberty, and property, versus rights delegated to the Federal government, including the 16th Amendment right to lay and collect taxes. This includes its obligation to act in good faith, for proper purposes and to carry out said functions inside the framework of United States Constitution's Bill of Rights. To preclude the availability of the Declaratory Judgment Act is to deprive the plaintiff and the courts of an important tool which should be used to clarify issues and resolve disputes in actions arising out of federal tax cases that do not violate the intent of the Anti-Injunctive Act.

For this Honorable Court to remain silent on this issue is to encourage '*clouding the waters*' of an important jurisdictional remedy under Article III § 2 of the U.S. Constitution (Appendix D).

III. To preserve and clarify important remedial statutory provisions against joint federal and state conspirators.

In the present case there was a concert of action between state and federal officials. Whether that concert of action was '*tacit*' or expressed, the actions of these officials in their understood conspiracy can be brought under the *Kletschka* standard, *infra* 42 U.S.C. § 1985, and 28 U.S.C. § 1343 because there is no requirement for state action or support for conduct of individual conspirators prescribed by statute of § 1985. This allows a cause of action against those who conspire to deprive another of equal protection of the laws or equal privileges and immunities. Its counterpart, 18 U.S.C. § 241-242, (appendix E) has little or no requirement of *state action*" in its text.

The Civil Rights Act in 42 U.S.C. § 1983, 1985, 1986 (appendix H) is remedial in nature. The act was passed to encourage redressing violations of constitutionally protected rights. It provided additional impetus by allowing attorney's expenses for successful plaintiffs.

For the courts to hold that a cause of action exists under 42 U.S.C. § 1983, 1985, 1986 against state conspirators, and then to hold that their federal counterparts in the same conspiracy (who have a broader instrumentality and power, and commit the greatest amount of damage to the plaintiff) are not liable under 42 U.S.C. § 1983, 1985, 1986, arbitrarily affords the Federal conspirators a greater protection against constitutional actions. That arbitrary exclusion of Federal joint conspirators from 42 U.S.C. § 1983, 1985, 1986 discourages redress of violations committed by federal officials. The undertaking to review constitutional violations by federal officials is a costly one in time and money to plaintiffs. Without the hope of recovery of attorney's expenses, a plaintiff can expect little assistance from the legal profession. The time, resources and procedural maze available to the defendant's counsel give them the ability to make that redress so costly that it discourages the most dedicated citizen who is armed only with a *Bivens* remedy. Even if the plaintiff can afford to buy the preservation and vindication of his constitutional rights, he can only lose, regardless of whether or not he prevailed.

This Honorable Court ruled in *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978) that Federal officials have the same immunity as state officials as set out in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683 (1974). Under the gravamen of the petitioner's case there is no just reason

for the strict interpretation of 42 U.S.C. § 1983, 1985 & 1986, 28 U.S.C. § 1343 which fails to apply the *Kletchka v. Driver*, 411 F.2d 436 (1969) proposition.

To affirm through inaction, is to send this petitioner back to a hostile lower court with no hope of assistance from counsel and it also gives this Honorable Court's blessing on the ambiguous, expedient and arbitrary opinion of the lower courts.

IV. To prevent the usurping of constitutional protections against punishing governmental actions.

On 10 July, 1972, agents of the Internal Revenue Service terminated Seibert's taxable year, seizing all property for *'fear'* that he might spend some of his assets to hire counsel or make bond. Seibert was charged from January 1, 1972 through July 7, 1972 with $6458.00 in taxes (before self-employment tax was added) and was required to file a return immediately under section 443 of Internal Revenue Code. Seibert filled out and signed the form 1040 tax return which was delivered to the Huntville I.R.S. office. That return showed no income for the period in question. *'At that point,'* the I.R.S. and Seibert were at issue. If their allegations were true, he was guilty of filing a fraudulent tax return and should have been prosecuted for same. In order to do that, however, some evidence of income would have to have been produced. None existed, thus that would have disproved their allegations, and probably meant the end of their improper use of said assessment.

During the very late 1960's and early 1970's persons in the Internal Revenue Service determined that I.R.S. power could be an effective weapon against political undesirables and an excellent aid to help local police departments insure convictions in the *"war against drugs"*.

Since an action which would take place under the civil tax law of 26 U.S.C. § 6851 was agressive, punshing and had no review of merit (because of 26 U.S.C. § 7421 (a), Appendix F), the allegations could stand without foundation. If properly timed in a coordinated effort with an assessment high enough, that accused person's resistance to the charges could be neutralized. If no evidence existed to support the tax case, I.R.S. would just drop the assessment, then the decision out of tax Court would be considered as a remedy for the accused taxpayer and would make subsequent issues *res adjudicata* even though the tax court petitioners were punished by undergoing loss of rights and the time and expense of litigation with no recovery of same. (see Taxpayer Attorney Fee Amendment PL 94-559 which provides attorney's fee only in which taxpayers are defendants).

If a tax court petitioner made it through the tax court procedure with his rights intact, for a subsequent civil action he would probably not survive a motion to dismiss or summary judgment. In the event a tax petitioner-plaintiff did survive those procedural pitfalls, the evidentiary hearing on immunity would protect all the Federal defendants involved. This was because the Internal Revenue Manual (Document MT 4500-129) 4585 *Termination of Taxable Period* under I.R.C. 6851, *Prima Facie Cases* 4585.3 eliminated the necessity for probable cause, and I.R.M. 4585.1 *Statutory Basis* told the agents *"assessments under I.R.C. 6851, are not . . .jeopardy assessments"*, so they were simply following orders (appendix I). This was a perfect way to afford double punishment and was an excellent tool for harassment without the *'technicalities'* or interference of constitional procedural safeguards.

Although Seibert was not guilty of any of the allegations leveled, he was punished by harassment, deprived of property, and denied the liberty to pursue a paying occupation, and had all rights and interest in property taken from July 10, 1972 to January 17, 1977 (a period of some four (4) years, six (6) months). In addition, Seibert was having to shoulder the burden of legal expenses and finally was forced into self representation, all without the right to face his accusor or even a hearing on the merit of the I.R.S. agents' allegations.

The 6th Amendment violation claim is based on the *nexus* of the tax case to that of a criminal case. The right of a citizen under our accusatory system gives him protection against arbitrary *'witch hunts'* and allows the accused to understand the nature of the accusations made against him.

The type of accusations, aggressiveness and the punitive nature of the forementioned actions of respondents could not have occurred and continued under any other area of law, neither civil law, considering the Constitutional safeguards of due process, nor in criminal law because of the defendant's rights to a speedy and public trial, to be informed of the nature of accusations, and to be confronted with witnesses against him.

On the other hand, Federal tax laws and actions are *"Napoleanic"* in nature and an odyssey in our system of justice. In the government's attempt to insure unchallenged tax income, it has caused a very real danger to the rights of citizens and to the Constitution's *"Bill of Rights"*, in that, the power given to I.R.S. is not subject to sufficient external constitutional protections against abuse.

The *nexus* to a criminal case is based on the conclusion of validity of allegations made, along with I.R.S.'s immediate and continued deprivation of property and rights. In *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, (1968), Justice Brennan delivered the opinion of the Court. The Court reversed the conviction of Bruton on the confrontation clause of the Sixth Amendment. Although Bruton was present when hearsay accusation evidence was admitted against him and the other defendant, the mere fact that evidence against Bruton might have been considered by the jury without his right to confront the allegation was sufficient to reverse his conviction.

In the present case, Seibert was deprived for years of rights and freedom without so much as a hearing or a chance to confront those making allegations against him.

It is this Honorable Court's historic duty to safeguard the Constitution and its principles against those who, by design or lack of understanding usurp its protections.

Seibert has been unsuccessful in his attempt to secure adequate redress by the courts in resolving these questions and disputes arising under the Constitution and laws of the United States.

This Honorable Court should address the forementioned issue for the reason that citizens who are confronted by aggressive and punitive governmental actions should be enititled to all the Constitutional protections regardless of whether that action is being taken under civil or criminal law.

V. To clarify whether the 16th Amendment supercedes the 8th Amendment.

In the present case there exists a conflict which has been ignored by the courts below. That conflict is

between the defendant's contention that the 16th Amendment supersedes other amendments of the U.S. Constitution, which allowed them unlimited freedom of actions in seizures and assessments (even if their actions were arbitrary), versus Seibert's contention that he had the right under the Eighth Amendment of the U.S. Constitution to an "*unobstructed*" bail in non-capital offenses and the right to an unhampered preparation of a defense, as explained in *Stack v. Boyle, U.S. Marshal*, 342 U.S. 1 72 S.Ct. 1 (1951). This case allows an accused freedom before conviction, thus permitting an unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. This is also necessary to preserve "*the presumption of innocence, secured only after centuries of struggle.*" *Stack, id.*

Obviously, an arrested defendant whose assets and rights were totally seized while incarcerated, before making bond and/or hiring counsel, would not be an example of an individual who was allowed "*unhampered preparation of defense*", since after total seizure, any bail would be excessive.

It is irrelevant which branch of the Federal or State government obstructs the right to bail. Once it is obstructed, the end result is the same. Under whose name it is accomplished is simply semantics.

Seibert contends that there is damage remedy under the Eighth Amendment as in *Hernandez v. Lattimore*, No. 78-2098, (2 Cir. Decided 6 December 1979).

The review of the forementioned issue is important for preservation of the Eighth Amendment's protection of the presumption of innocence and to prevent future abridgment of those rights under the guise of federal taxation.

VI. To determine whether federal taxation may establish a new standard of due process other than what has historically been established by the United States Constitution.

This Honorable Court and some Justices herein have "*expressly reserved*" the question in *Laing v. United States*, 423 U.S. 161, 184 96 S.Ct. 473, 485 n. 26 (1976) the question as to whether due process is violated by similar conduct of I.R.S. agents in failure to issue a timely notice of deficiency. (appendix F 6861 (b) which is a jurisdictional prerequisit in 6213 (a) before entering tax court). If this Honorable Court is ever going to address this question directly, it must be in this case. Out of some 338 cases that evolved during the time that these abuses were taking place, the present case is the only surving one.

The fore-referenced unanswered question is one of the foundations of the damage claim of Seibert. The failure to address this issue will sanction the establishment of different standards of due process; one for federal taxation, and another standard for commerce.

VII. To prevent the establishment of an inconsistent standard by which to measure unconstitutional actions of federal officials.

The federal defendants' counsel have argued that federal officials have no affirmative duty to take evidence from citizens not covered by 42 U.S.C. § 1981. They argue that *Barr v. Matteo*, 360 U.S. 564 (1954) gives them the absolute right to owe no duty to Seibert for nonfeasance, misfeasance or malfeasance including the refusal to accept evidence.

The argument of these Federal Officials is that they may, in an arbitrary and discretionary manner, accept or

reject such evidence as they deem appropriate whenever taking official action, without being subject to any minimum standard. This allows them absolute selective use of power even if their intent is insidious.

An implied affirmation of the Federal officials' *Barr, id.* nexus to the present case would discourage making an efficient or responsive federal government, and there would not be adequate safeguards against abuse of that discretion.

The federal appellees further contended they were entitled to a qualified immunity simply by virture of orders which they understood to be proper. That argument has been used in attempts in many cases to protect actions against review of unconstitutional conduct. In essence, they argue that the basic protection granted to them against criminal prosecution under *Criminal Code Reform Act of 1973, S1400, 93rd Cong. 1st Sess.*, also extends to civil liabilities for conspiracies to violate, or violations of constitutionally protected rights, regardless of how repugnant to the constitution their actions were.

That argument by the appellees' counsel seems to place them in an inconsistent position. In *United States v. Ehrlichman,* 376 F.Supp. 29 (1974), the five defendants acting under color of federal law in *'good faith'* for the purpose of national security, and under authority of the President, conspired to and entered a Los Angeles psychiatrist's office without a warrant. The defendants were charged under 18 U.S.C. § 241-§ 242 (Appendix E) with conspiracy against rights of citizens and deprivation of rights under color of law.

Seibert contends that the same mentality which lead to the break-in of Dr. Fielding's office also lead to the *'restructure'* and abuse of the I.R.S. powers as exhibited

by the *"intentional"* vagueness of I.R.M. Document MT 4500-129, (9-15-71), 4585.1, I.R.M. Document MT 4500-154, (12-15-72), 4585.3 and the compiling of the *"enemies list"* which had some of those listed, as targeted for Federal tax audits. He also contends that a break-in authorized by the President without a warrant is no more repugnant to the Constitution than the harassment and seizure of property and rights of Seibert for over 4½ years without a hearing on cause or trial on its merits. The failure to address this issue is to invite future scheming to abuse powers of government and usurp the constitutional protections.

VIII. To assist the discouragement of using one by one procedural tactics as the main method to deter constitutional redress on the merit.

Seibert has been embattled in litigation since July of 1972. For over 4½ years of that time, he had no rights to wages or property. The little income he earned between I.R.S. seizures went to attorney's expenses. Although he minimized his expenses by doing some of his own legal work, the almost 8 years of litigation has taken its toll and Seibert can not afford to appeal on every issue as the courts below have demonstrated they would have him do.

If this Honorable Court denies the Writ of Certiorari on these issues at this stage, Seibert will be unable to afford continuing appeals from the evidentiary hearing where a hostile lower court finds that the mere following of procedure (as the I.R.S. officials understood they could apply them) is all that was required to gain immunity. The granting of immunity will bar futher review of the facts and respondents' intent.

Seibert has endured many levels of the procedural mazes of judical expediency. It is not equitable to expect him to endure more of the same in his attempt to secure *adequate* redress and remedies for the wrongful violations and damages committed against him.

CONCLUSION

The forementioned issues are important for the application and preservation of constitutional standards, which will prevent citizens in future cases from being arbitrarily deprived of rights and liberties in the name of '*taxation*'. The failure to address these issues is to invite more scheming from those who would use the power unique to the Internal Revenue Code for purposes other than they were intended, and will prevent Seibert from being allowed to invoke all jurisdictional, remedial and constitutional grounds to which he is entitled.

For the foregoing reasons, a Writ of Certiorari should be granted to review the judgments and opinions of the Court of Appeals for the Fifth Circuit.

February 22, 1980

Carl Michael Seibert

CARL MICHAEL SEIBERT
4802 Westwood Drive, N.W.
Huntsville, Alabama 35810
(205) 852-3592
Petitioner Pro se

APPENDIX A.

[594 F.2d 423]

Judgment and Opinion of the Court of Appeals.

In the United States Court of Appeals, for the Fifth Circuit.

Carl Michael SEIBERT, Plaintiff-Appellant, versus D. T. BAPTIST, District Director of Internal Revenue Service, et al., Defendant-Appellees. No. 78-3007, Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

(May 3, 1979).

Taxpayer sued internal revenue officials seeking monetary damages based on alleged abuse of authority in terminating plaintiff's taxable period and in failure to follow prescribed procedure in making jeopardy assessments of income tax deficiency, with complaint also alleging that defendants unlawfully seized plaintiff's property and denied him due process. The United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J., dismissed, and plaintiff appealed. The Court of Appeals, affirmed on basis of the district court's memorandum opinion holding that: (1) to extent that complaint was read to assert a claim against United States, it was barred by sovereign immunity; (2) declaratory judgment statute is not an independent basis of jurisdiction; (3) recovery could not be had under civil rights acts since defendants were federal officials acting under color of federal law, and (4) no right of action in damages was to be implied directly under the Fourth and Fifth Amendments.

Affirmed.

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*Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970. 431 F.2d 409, Part I.

Appeal from the United States District Court for the Northern District of Alabama.

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the Memorandum of Opinion of United States District Judge Sam C. Pointer, Jr., a copy of which is an appendix hereto.

SEIBERT v. BAPTIST

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

CARL MICHAEL SEIBERT	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CA 77 P 0951 NE
	)	
	)	
D. T. BAPTIST,	)	
DISTRICT DIRECTOR	)	
OF INTERNAL REVENUE,	)	
et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF OPINION BACKGROUND

What can only be characterized as an unusual set of events has led to the defendants' motion to dismiss the plaintiff's complaint. It is this motion which is currently before the court. Since both parties have submitted memoranda and affidavits in support of their respective positions, the motion will be treated as one for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

On July 7, 1972, plaintiff Carl Michael Seibert was arrested by the Huntsville Police Department for possession of LSD. At the time of his arrest plaintiff was apparently driving his father's car. The Huntsville Police seized the car and its contents, which included a guitar and a currency collection.

On July 10, 1972, agents of the Internal Revenue Service served plaintiff with a Notice of Termination of Taxable Period pursuant to Section 6851 of the Internal Revenue Code[1] by which plaintiff's income tax liability for the period January 1, 1972, to July 7, 1972, was made immediately due and payable. Plaintiff was also served with a Notice of Seizure under I.R.C. Section 6331.[2] By this notice it was indicated that the car and its contents

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[1]26 U.S.C.A. § 6851, as it was in force in 1972, reads in applicable part as follows:

> *If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, . . . the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated . . ."*

[2]26 U.S.C.A. § 6331. In applicable part, that section reads as follows:

> *"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.*

previously impounded by the Huntsville police were being seized by the IRS in partial payment of tax deficiencies proposed against plaintiff in the amount of $6,458.00. Plaintiff was never given information about how the deficiency was computed.

At this point, it becomes difficult to determine just what events transpired, and in what order. According to plaintiff's amended complaint, on October 19, 1972, plaintiff and his father initiated suit in federal court to enjoin the IRS from selling the seized property at auction, and to compel an explanation of the basis for the seizure. That suit was dismissed by the district court as to all material issues on November 1, 1972.[3]

At some point during this sequence of events, defendants' memorandum in support of its motion to dismiss indicates that the termination assessment against plaintiff was abated and a notice of deficiency[4] was issued to the plaintiff.[5] In response to the notice, plaintiff filed a

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[3]*Seibert v. D. T. Baptist*, CA No. 72-936-NE (N.D.Ala.1972). The basis for the dismissal was apparently 26 U.S.C.A. § 7421(a) which provides in material part:

> "... [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom [the] tax was assessed."

See *Enochs v. Williams Packing Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962).

[4]26 U.S.C.A. § 6212 provides that a taxpayer be notified in the event any deficiency in taxes owed is declared against such taxpayer.

[5]A stipulation entered into between the plaintiff and the Internal Revenue Service pursuant to plaintiff's request for a redetermination of his deficiency indicates that the deficiency notice was mailed August 7, 1974. The exact reason for the lengthy delay between the original termination assessment and notice of deficiency is not clear.

petition for redetermination of his tax deficiency,[6] with the United States Tax Court. Upon a stipulation of the parties, the Tax court entered an order on January 17, 1977, to the effect that there had been an overpayment in income taxes by plaintiff for the 1972 tax year in the amount of $2,893.15.[7] By the terms of the stipulation incorporated into the Tax Court's order, plaintiff did not waive *"any rights he may now have to proceed against the Internal Revenue Service or any employee for damages or restitution on account of the seizure and release of certain personal property . . . "* It is this reservation of right which forms the basis of the present controversy.

THE PENDING LITIGATION

On July 11, 1977, plaintiff proceeding *pro se*, filed a complaint against the District Director of the Internal Revenue Service, four officals of the IRS, two Huntsville Policemen, and a Madison County Circuit Judge.[8] The

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[6]26 U.S.C.A. § 6213(a) allows a taxpayer, within 90 days after notice of deficiency, to file a petition with the Tax Court for a redetermination of the deficiency.

[7]*Seibert v. Commissioner of Internal Revenue*, No. 8724-74 (U.S.T.C. Jan. 17, 1977).

[8]Defendants Randall Duck and Gary Patterson, Huntsville Police Department officers, were dismissed as defendants by an order of this court dated October 4, 1977. Defendant, David R. Archer, a Madison County Circuit Judge, was determined to be insulated from liability by judicial immunity on November 10, 1977. *See Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Plaintiff failed to amend his complaint to state a cognizable claim against Archer within the 30 days granted by the court's order. Thus, the only remaining defendants are five officials of the Internal Revenue Service.

complaint, without alleging any statuatory basis for relief or grounds for jurisdiction of the court, sought recovery of property seized by the IRS, or compensation therefor. On defendent's motion, the court dismissed this complaint and granted the plaintiff thirty (30) days to amend the complaint to state a jurisdictional basis for the cause of action. Pursuant to this order, on January 3, 1978, plaintiff filed an amended complaint which the defendants' pending motion seeks to have dismissed.

By his amended complaint, the plaintiff alleged jurisdiction of this court pursuant to the fifth and fourteenth amendments to the United States Constitution, and under 28 U.S.C. §§ 2201-02, § 1331, § 1343, and 42 U.S.C. §§ 1983, 1985, and 1986. The gravamen of plaintiff's amended claim is that defendent IRS officials have abused their authority under 26 U.S.C.A. § 6851 to terminate plaintiff's taxable period, and that they did not follow the prescribed procedure under 26 U.S.C.A. § 6861[9] to make jeopardy assessments of income tax deficiency. Broadly read, plaintiff's complaint also alleges that the defendants subjected him to malicious prosecution and harassment, that they unlawfully seized his property, caused him and his family mental anguish, and denied him due process and the equal protection of the laws. In his prayer for relief plaintiff requests return of,

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[9]In material part, 26, U.S.C.A. § 6861 reads as follows:

> *"If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall notwithstanding the provisions of section 6213(a), immediately assess such deficiency . . . and notice and demand shall be made by the Secretary or his delegate for the payment thereof."*

or compensation for, all previously seized property,[10] as well as compensatory and punitive damages, costs, and attorney's fees.

JURISDICTION OF THE COURT

The district courts of the United States are courts, the jurisdiction of which is *"limited to those cases within Art. III, Sec. 2 of the Constitution over which an Act of Congress has given [them] jurisdiction."*[11] Serious questions are presented here with respect to whether this court has the authority to decide the potential merits of this case. Each of the jurisdictional allegations asserted by the plaintiff therefore requires close scrutiny.

CONSTRUCTION OF PLAINTIFF'S CLAIM AS ONE AGAINST THE SOVEREIGN

Defendents have devoted a substantial portion of their memorandum to the proposition that the plaintiff's claim,

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[10]As previously indicated, the seized property included an automobile, a guitar and a currency collection. According to defendants' memorandum, the car was released to plaintiff's father on a showing that he was its owner. The guitar, defendants state, was also released to a third person, Ms. Veronica Louise Potter, who demonstrated ownership of it. Plaintiff contends, however, that Ms. Potter had given the guitar to him as a gift, so that its release to her was improper. The final item seized was a sum of money which plaintiff claims was a currency collection of sequentially-numbered, uncirculated bills and silver certificates. Defendants' memorandum, however, suggest that when the money was seized there was nothing indicated by its appearance which distinguished it as a collection, and further, that a list of the serial numbers of the bills made at the time of the seizure indicated that none of them were sequentially numbered.

[11]*Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied* 336 U.S. 904, 69 S.Ct. 491, 93 L.Ed. 1069.

while nominally filed against officials of the Internal Revenue Service, is in actuality a suit against the United States as real party in interest. As such, defendants argue, plaintiff's claims are barred by the doctrine of sovereign immunity, by which the United States may not be sued without its consent.[12] Defendants also point out that while the Federal Tort Claims Act[13] swept aside a large portion of the government's immunity for the tortious conduct of its employees, the plaintiff may not seek recovery under the Act for a number of reasons. Most notable among these reasons asserted for the nonapplicability of the FTCA is the 28 U.S.C. § 2680(c) exclusion from the Act's provisions of "[a]*ny claim rising in respect of the assessment or collection of any tax*..."[14]

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[12]*See, e. g., Affiliated Ute Citizens of Utah v.United States*, 406 U.S. 128, 141, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); *United States v. Alabama*, 313 U.S. 274, 281, 61 S.Ct. 1011, 85 L.Ed. 1327 (1941).

[13]By 28 U.S.C. § 1346(b), the district courts are given "*exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" Substantive provisions of the Tort Claims Act are found at 28 U.S.C. § 2671 *et seq.*

[14]28 U.S.C. § 2680(c). Other asserted justifications for the nonapplicability of the FTCA include plaintiff's apparent failure to exhaust administrative remedies as required by 28 U.S.C. § 2675(a), the 28 U.S.C. § 2680(a) exclusion from the Act of claims arising from the performance by a government official of discretionary duties, and, finally, the exclusion under 28 U.S.C. § 2401(b) of all claims not raised within the period of the Act's two-year statue of limitations.

[1] To the extent, then that the plaintiff's complaint is read to assert a claim against the United States, it would appear that this claim is barred by the doctrine of sovereign immunity, and the absence of any statutory exceptions for actions of the kind presented here. The court is of the opinion, however, that this determination does not dispose of the litigation. Presumably, defendants' sovereign immunity theories resulted from their expectation that the United States Supreme Court would clothe all federal executive department officials in the protection of absolute immunity from damages for injuries caused by their unconstitutional conduct. Had the Court adopted such an approach, the plaintiff's only possibility for recovery would have been against the United States. Contrary to defendants' expectations, however, in *Butz v. Economou*, — U.S. —, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court held that in suits for damages arising from unconstitutional action, federal executive officials are entitled only to the qualified immunity set out in *Scheuer v. Rhodes.*[15] This decision suggests the possibility of a claim by the plaintiff against the defendant officials in their individual capacities. The question whether such individual liability may in fact be imposed on the defendants requires consideration at this point.

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[15]416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1975). In *Scheuer*, the Court dealt with the degree of immunity to be accorded state executive officals from civil rights actions under 42 U.S.C. § 1983. There the Supreme Court held that such officials were entitled to a qualified immunity from damage liability for constitutional deprivations. The extent of this immunity was seen to depend upon factors including the "*scope of discretion and responsibilities of the office,*" "*the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based,*" and the "*reasonable grounds*" and "*good-faith*" belief in light of such circumstances by the officials that their actions were appropriate. 416 U.S. at 247-48, 94 S.Ct at 1692.

JURISDICTION OF THE DISTRICT COURT OVER CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

As noted previously, by the amended complaint, plaintiff alleged jurisdiction of this court over his claims against the defendants under several statutory and constitutional provisions. It appears clear that the statutory bases are without merit, and can be considered without extensive discussion. The possibility, however, of a direct action under the fourth or fifth amendments, based on the court's general 28 U.S.C. § 1331 *"arising under"* jurisdiction[16] requires close scrutiny.

[2] The first statutory basis for jurisdiction asserted by the plaintiff is the declaratory judgment provision of 28 U.S.C. §§ 2201-02. That this statute alone will not support plaintiff's cause of action is apparent for two reasons. First, the declaratory judgment sections do not establish an independent basis for federal jurisdiction, but rather only establish a separate remedy available in cases where jurisdiction otherwise exists.[17] Secondly, even if the declaratory judgment provisions authorized federal jurisdiction independently of any other basis, 28 U.S.C. § 2201 by its terms specifically excludes the use of

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[16]28 U.S.C. § 1331(a) provides as follows:

> *"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."*

[17]*See, e.g., Red Lobster Inns of America, Inc. v New England Oyster House, Inc.*, 524 F.2d 968, 969 (5th Cir. 1975); *Brown & Root, Inc. v. Big Rock Corporation*, 383 F.2d 662, 666 (5th Cir. 1967).

declaratory judgments *"with respect to Federal taxes."* Clearly, then, this court has no jurisdiction over plaintiff's claim by virtue of 28 U.S.C. § 2201-02.

The plaintiff also alleges that federal jurisdiction is conferred over the present controversy by 28 U.S.C. § 1343. This statute is the jurisdictional basis for suits under 42 U.S.C. §§ 1983 and 1985. These sections allow a plaintiff to redress the deprivation of civil rights by authorities who act under the color of state law or by those who conspire to deprive such rights. In addition to 42 U.S.C. §§ 1983 and 1985 plaintiff further alleges the applicability of 42 U.S.C. § 1986, under which a person may be held liable for damages if such person neglects to attempt to prevent a conspiracy to deprive constitutional rights as such conspiracy is defined in § 1985.

[3] A recent per curiam decision of the Fifth Circuit Court of Appeals disposes of this asserted basis for federal jurisdiction in a manner adverse to plaintiff's contention. In *Mack v. Alexander*, 575 F.2d 488 (5th Cir. 1978), the plaintiff filed suit against certain officials of the Internal Revenue Service based on the defendants' alleged violations of constitutional rights stemming from an IRS attempt to levy on a joint bank account held by plaintiff and another party. Federal jurisdiction was asserted under 28 U.S.C. § 1343 and 42 U.S.C. §§ 1983 and 1985. In upholding the district court's dismissal of the action, the Fifth Circuit spoke in language applicable to the controversy *sub judice:*

> *"Section 1343 places original jurisdiction in the district courts when there is a substantive claim for violation of 42 U.S.C. §§ 1983 and 1985. However, we agree with the district courts ruling that these statutes*

provide a remedy for deprivation of rights under color of state law and do not apply when the defendants are acting under color of federal law."

575 F.2d at 489 (citation omitted). In the present case, similarly, plaintiff's only claims are that the defendants abused their authority under the federal Internal Revenue Code.

The final basis for jurisdiction asserted by the plaintiff, and the one which is by far the most complex is the general federal question jurisdiction of 28 U.S.C. § 1331. This statute provides the jurisdictional basis for civil actions which arise under the Constitution, laws, or treaties of the United States. Since, as indicated previously, there is no statutory authorization for damage claims against IRS officials, a cause of action supportable under § 1331 would have to be one which arises under the Constitution of the United States. Plaintiff has made such an *"arising under"* claim by virtue of his allegation that he was denied the due process and equal protection guaranteed to him by the fifth amendment to the Constitution.[18] Further, while the defendants' memorandum denies that plaintiff has ever alleged any fourth amendment violations (Memorandum in Support of Motion to Dismiss at 14), the court concludes that the plaintiff's complaint can be read to allege an unreasonable seizure of his property. Whether or not such fourth and

[18]Unlike the fourteenth amendment, the fifth amendment has no independent equal protection clause. However, the Supreme Court has held that the fifth amendment's due process clause *"prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process.'"* *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975), quoting *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

fifth amendments claims will support an action based on 28 U.S.C. § 1331 remains to be determined.

BIVENS, BUTZ, AND DAVIS V. PASSMAN

[4,5] As indicated previously, the Supreme Court's recent decision in *Butz v. Economou*[19] determined that federal executive officials are entitled only to a qualified immunity from suits for damages arising from their unconstitutional action. The Court was careful to point out, however, that not all allegations of deprivations of constitional rights can be made the basis for damage claims. Rather, *"[u]nless the complaint states a* ***compensable claim for relief under the Federal Constitution,*** *it should not survive a motion to dismiss."*[20] To this date, the only previously-recognized *"compensable claim for relief under the Federal Constitution"* has come from *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In that case, the Supreme Court held that a violation of the fourth amendment by federal narcotics officials gave rise to a cause of action for damages consequent upon the unconstitutional conduct, and based on the general federal question jurisdiction of the federal courts. While presented with an opportunity to do so, the Court in *Butz v. Economou* specifically refused to consider which, if any, other personal interests are protected by the Constitution.[21] Resolution of plaintiff's

[19]— U.S. —, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978).

[20]*Id.* at —, 98 S.Ct. at 2911 (emphasis added).

[21]*Id.* at —, 98 S.Ct. 2894, n.8.

constitutional claims in the pending litigation then, depends upon *Bivens* itself, as well as on the Fifth Circuit's en banc decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978).

Davis v. Passman is an extremely important case from the standpoint of the matter *sub judice* for two reasons. First, based on an analysis of how the Supreme Court had implied the fourth amendment cause of action in *Bivens*, the Fifth Circuit determined that no corresponding constitutional cause of action existed under the fifth amendment for an allegedly discriminatory dismissal of the plaintiff by her employer, a former member of Congress. Secondly, and again based on its analysis of the Supreme Court's *Bivens* decison, the Fifth Circuit also suggested that not even all alleged violations of the fourth amendment will support the cause of action which *Bivens* implied. The consequences of this analysis in *Davis* will be seen to be dispositive of the remaining matters presented in the current litigation.

The *Davis* case tested the cause of action implied in *Bivens* from two standpoints. The first approach considered the action as implied not solely on constitutional authority, but rather from the constitutional protections of the fourth amendment, buttressed by analogy to statutorily-implied causes of action where Congress had created federal rights but had provided no corresponding federal remedy. Since the right to be secure from unreasonable searches and seizures was viewed as one of the most fundamental of federal rights, and since the exclusionary rule of *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) had proven to be a less than

satisfactory remedy, the damages cause of action was viewed as necessary to effectuate the amendment. The second approach, distinguished from that found to have been used by the Supreme Court in *Bivens*, was determined to be appropriate only in situations in which the Constitution compels the existence of a damages remedy to vindicate the rights asserted.

[6] Having found that the *Bivens cause of action evolved from both constitutional and statutory bases, the Fifth Circuit tested the propriety of implication of a fifth amendment cause of action under the principles of Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), *"the Supreme Court's most comprehensive treatment of implied statutory causes of action."*[22] In that case, the Supreme Court had listed four factors to be considered in the decision whether to imply a cause of action from a statutory right: (1) whether the provision asserted creates an especial right in the plaintiff; (2) whether the action of Congress in the field indicates an intent to allow such a remedy or at least an intent not to deny the remedy; (3) whether implication of the remedy would be consistent with the purpose of the right asserted; and (4) whether the cause of action implied would be one appropriate for federal law.[23]

In light of these factors, the Fifth Circuit attached a great deal of significance in *Davis v. Passman* to the fact that congressional amendments of Title VII had consistently avoided inclusion of the federal government within the Civil Rights Act's definition of the term

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[22]571 F.2d at 796.

[23]*Id.* at 797, citing *Cort v. Ash*, U.S. at 78, 95 S.Ct. 2080.

"*employer.*" Consequently, in *Davis*, the court determined that no federal common law cause of action was due to be implied under the fifth amendment for alleged employment discrimination by a former Member of Congress. Similarly, under the second prong of the two-prong test for implying causes of action, the court of appeals also held that a fifth amendment cause was not constitutionally compelled. This determinination was based on the realization that not all rights included within the breadth of due process demanded federal protection through a direct cause of action.

[7] While this discussion of *Davis v. Passman* has been somewhat lengthy, the court believes that such analysis is required since that decision is viewed as dispositive of the remaining issues in the current controversy. Fortunately, in applying *Davis* to the present facts, the same considerations will be relevant to the plaintitt's asserted implied causes of action under both the fourth and fifth amendments. For the reasons which appear below, the court has concluded that such causes of action are not to be implied in the present situation. Following the approach adopted in *Davis*, a brief analysis of the current controversy in light of the relevant factors from *Cort v. Ash*, for implying causes of action is required.

[8] The first factor to be considered is whether the constitutional provisions asserted — here the fourth and fifth amendments — create an especial right in the plaintiff. The Fifth Circuit approach to this "*especial right*" requires that the injury inflicted on the plaintiff must directly infringe upon a constitutional guarantee. As pointed out in *Davis*, however, due process encompasses virtually all civil liberties embodied by the Constitution.

As such, an allegation of the denial of due process does not appear to satisfy the requirement of direct infringement of a constitutional right. Similarly, while in *Bivens* infringement of the plaintiff's fourth amendment rights was clear and direct, in the present case, it appears that appropriate notice of termination and notice of seizure were given to the plaintiff at the time his property was taken. This being the case, the seizure was not so unreasonable as that involved in *Bivens*.

The second factor required to be considered toward the implication of causes of action is whether congressional activity in the field indicates an intent to allow such a remedy, or at least not to deny the remedy. It is with this factor that the strongest reasons for not implying a cause of action under either the fourth or fifth amendments in the present case are found; for here, congressional indications that no such remedy is to be allowed are clearly evident. First, the Federal Tort Claims Act specifically excludes claim against the United States if they relate to the assessment or collection of taxes.[24] Second, as further indication of congressional intent that the assessment and collection of federal taxes are to be free from judicial intervention, section 7421(a) of the Internal Revenue Code[25] prohibits any suit to restrain the assessment or collection of taxes. Finally, the fact that alternative measures for the collecting of tax assessments

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[24] 28 U.S.C. § 2080(c).

[25] 26 U.S.C.A. § 7421(a).

are provided,[26] is indicative of further congressional intent that individual liability for Internal Revenue officials is not to be implied.

The third factor required to be considered in determining whether to imply a federal common law cause of action is whether implication of such a remedy would be consistent with the purpose of the constitutional right asserted. As noted in *Davis* the breadth of the fifth amendment due process clause indicates that implication of a damage remedy from its provisions would be judicially unmanageable.[27] Further, while the breadth of the fourth amendment is more limited, the extensive statutory regulation of Internal Revenue matters (regulation which was not existent to the same degree over narcotics officials in *Bivens*) suggests that implication of a private cause of action would be inconsistent with the statutory scheme enacted by Congress.

[9] The final factor to be considered under *Cort v. Ash* is whether the implied action would be one appropriate for federal law. With regard to the fifth amendment claim, implication of a cause of action in the current case would present the same problems as those recognized by the Fifth Circuit in *Davis*. As Judge Clark pointed out in that decision, "*Because of the breadth of due process, a decision implying as action for money*

[26]26 U.S.C.A. § 6213(a) allows a taxpayer, within 90 days after notice of deficiency, to file a petition with the Tax Court for a redetermination of the deficiency. Further, 28 U.S.C. § 1346(a)(l) grants jurisdiction to the district courts for actions against the United States for the recovery of any tax allegedly erroneously or illegally assessed or collected.

[27]571 F.2d at 799.

damages from the fifth amendment Due Process Clause alone would extend an action for damages to any constitutional guarantee."[28] Similarly, although the same problems of breadth of the constitutional provision are not present with the fourth amendment claims, significant difficulties are still encountered. While the matter of abuse of IRS authority is obviously not a matter "*traditionally relegated to state law,*"[29] *the fact that extensive, specific congressional regulation of federal taxation already exists indicates that neither is the matter one appropriate for implied* federal law. Rather, it is a matter which can best be managed by further congressional refinements as these are deemed necessary.

The final consideration with regard to whether a constitutional cause of action is to be implied in this case is whether, notwithstanding congressional action or inaction, a damage action is indispensible to the effectuation of the constitutional rights asserted. Here again, the court concludes that such an action is not constitutionally compelled. In the face of assertions of protected fourth and fifth amendments claims, it is not to be forgotten that the power of Congress "*to lay and collect taxes*" is also constitutionally-mandated.[30] Pursuant to this authority, Congress has enacted one of this nation's most comprehensive legislative schemes. Adequate provision is made a part of this scheme for safeguarding of due process and equal protection, and for

[28]*Id.* at 799-800.

[29]*Cort v. Ash, supra,* 422 U.S. at 78, 95 S.Ct. 2080.

[30]U.S. Const., amend. XVI.

assurances against unreasonable seizures. The court therefore concludes, that under the facts as here presented, the plaintiff is entitled to no more.

Accordingly, it appears that the plaintiff has not asserted a claim "*aris[ing] under the Constitution, laws, or treaties of the United States.*" Therefore, this court has no jurisdiction to entertain the merits of the litigation. Absent jurisdiction over the subject matter of plaintiff's complaint, the action must be dismissed. Judgment to this effect shall be entered by separate order.

Done this the 11th day of August, 1978.

(s) **Sam C. Pointer, Jr.**
United States District Judge
Sam C. Pointer, Jr.

APPENDIX B.

[599 F.2d 743]

Carl Michael SEIBERT, Plaintiff-Appellant, versus D. T. BAPTIST, District Director of Internal Revenue Service, et al., Defendant-Appellees. No. 78-3007.

United States Court of Appeals, Fifth Circuit.

(July 30, 1979).

Appeal from United States District Court, Northern District of Alabama; Sam C. Pointer, Jr., Judge.

ON PETITION FOR REHEARING

(Opinion May 3, 1979, 5 Cir., 1979, 594 F.2d 423)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM:

On May 3, 1979, we affirmed *Seibert v. Baptist* on the basis of the United States District Judge's Memorandum of Opinion. Relying on our *en banc* decision, *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), the lower court refused to recognize an implied private cause of action for damages under the due process clause of the fifth amendment. In *Davis v. Passman*, — U.S. —, 99 S.Ct. 2264, 60 L.Ed.2d — (1979), a ruling announced on June 5, 1979, however, the United States Supreme Court reversed our *en banc* decision and found that a cause of action as well as a damages remedy could be implied under the due process clause of the fifth amendment. We therefore reverse and remand to the district court.

APPENDIX C.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-3007

CARL MICHAEL SEIBERT,

Plaintiff-Appellant,

versus

D. T. BAPTIST, District Director of
Internal Revenue Service, ET AL.,

Defendant-Appellees.

.....

Appeal from the United States District Court for the
Northern District of Alabama

.....

Before AINSWORTH, JR., GOLDBOLD and VANCE, Circuit Judges.

BY THE COURT:

The court has considered the pending motions of appellant and finds the same to be frivolous. All pending motions in this case are denied.

APPENDIX D

CONSTITUTIONAL PROVISIONS

Article III, § 2 of the United States Constitution, provides in pertinent part, that:

> *The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, . . . (and) to all cases affecting . . . public ministers and consuls; . . . all cases . . . (in) controversies to which the United States shall be a party . .*
>
> *In all the other cases before mentioned, the supreme court shall have appellate jurisdiction both as to law and fact, . . .*

The Fourth Amendment to the Constitution of the United States provides, in pertient part, that:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . things to be seized.*

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that:

> *No person shall be held to answer for a(n) . . . otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb (liberty), nor shall [he] be compelled in any criminal case to be a witness against himself . . .*

The Sixth Amendment to the Constitution of the United States provides, in pertinent part that:

> *. . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.*

The Eighth Amendment to the Constitution of the United States provides that:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

Section 241 (Conspiracy against rights of citizens) of Title 18 of the United States Code provides that:

> *If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or*
>
> *If two or more persons go in disguise on the highway, or on the premises of another, with the intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —*
>
> *They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.*

Section 242 (Deprivation of rights under color of law) of Title 18 of the United States Code provides that:

> *Whoever, under color of any law, statute, ordiance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned*

not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

APPENDIX F

STATUTES AND REGULATIONS INVOLVED

Section 6212 (Notice of deficiency) of Title 26 of the United States Code provides in pertient part, that:

(a) In general. — If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Section 6213 (Restrictions applicable to deficiencies, petition to Tax Court) of Title 26 of the United States Code provides in pertinent part, that:

(a) Time for filing petition and restriction on assessment. — Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such

assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoyed by a proceeding in the proper court.

Section 6331 (Levy and distraint) of Title 26 of the United States Code provides that:

(a) Authority of Secretary or delegate. — If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States, the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. — The term "levy" as used in this Title includes the power of distraint and seizure by any means. A levy shall extend only

to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or right to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures. — Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

Section 6851 (Termination of taxable year) of Title 26 of the United States Code provides in pertinent part, that:

(a) Income tax in jeopardy. —

(1) In general. — If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate

payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy.

Section 6861(b) of Title 26 of United States Code provides in pertinent part that:

(b) Deficiency letters. — If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 6212(a), then the Secretary or his delegate shall mail a notice under such subsection within 60 days after the making of the assessment.

Section 7421 (Prohibition of suits to restrain assessment or collection) of Title 26 of the United States Code provides in pertinent part, that:

(a) Tax. — Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

APPENDIX G

Section 1331 (Federal question; amount in controversy; costs) of Title 28 of the United States Code provides in pertinent part, that:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Section 1343 (Civil rights and elective franchise) of Title 28 of the United States Code provides, that:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act

of Congress providing for the protection of civil rights, including the right to vote.

Section 2201 (Creation of remedy) of Title 28 of the United States Code provides that:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 (26 USCS § 7428), any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal regulations of any interested party seeking such declaration, shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202 (Further relief) of Title 28 of the United States Code provides that:

Further necessary or proper relief based on a declaratory judgment or decree may be granted after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX H

Section 1983 (Civil action for deprivation of rights) of Title 42 of the United States Code provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985 of Title 42 of the United States Code provides in pertinent part, that:

(3) Depriving persons of rights or privilages. (sic) If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all person within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any

citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986 (Same; action for neglect to prevent) of Title 42 of the United States Code provides that:

Every person who, having knowledge that any of the wrongs, conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the

next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

APPENDIX I

Internal Revenue Manual: [Document MT 4500-129 (9-15-71)]: paragraph 4585, Termination of Taxable Period under IRC 6851, provides in pertinent part, that:

¶ *4585.1* ***Statutory Basis***

(1) IRC 6851 specifically applies when the taxable year of a taxpayer has not ended, and also when taxable year has ended but the due date for filing the return has not arrived.

(2) Assessment under IRC 6851 are not in a technical sense jeopardy assessments. Nevertheless, the review procedures in IRM 4854.8 relating to jeopardy assessments apply also to assessments under IRC 6851, except with respect to departing aliens (see IRM 4299).

(3) IRC 6658 provides that, in addition to all other penalties, a penalty of 25 per centum of the total amount of the tax or deficiency in tax, may be added as a part of the tax for violations or attempts to violate the provisions of IRC 6851.

Internal Revenue Manual: [Document MT 4500-154 (12-15-72)]: paragraph 4585.3, Prima Facie Cases, provides in pertinent part, that:

(1) Certain conditions and circumstances can properly be considered as establishing prima facie cases in which termination assessments should be made. These cases are deemed to meet one or all of the conditions listed in IRM 4585.2:(1). However, the report of investigation supporting the recommendation should be supported as provided by IRM 4585.2:(2).

(2) The type of cases are as follows:

(h) Other taxpayers where the facts and circumstances indicate that the taxpayer's present financial condition or future possibilities are such as to make collection of the tax doubtful.

Supreme Court, U. S.
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No. 79-1309

In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

D. T. BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner brought this action in the United States District Court for the Northern District of Alabama against a number of individuals, including five present and former employees of the Internal Revenue Service, seeking damages and other relief for alleged constitutional violations in connection with the termination of his taxable year 1972 and the subsequent seizure and disposition of his property (R. 2).[1] The property was

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[1] "R." refers to the record on appeal filed in the court of appeals. Petitioner's original complaint also named two employees of the Huntsville, Alabama, police department and an Alabama state court judge. The action against the Huntsville police department employees was thereafter dismissed on petitioner's own motion and the action against the state court judge was dismissed on grounds of judicial immunity (R. 6, 7, 11). Those parties are therefore no longer in the case. Petitioner thereafter filed an amended complaint naming the five federal defendants and a sixth individual characterized therein as a "paid informer" of the Huntsville police department (R. 27-33).

seized on July 10, 1972, from the custody of the Huntsville, Alabama, police department, which had impounded it following petitioner's arrest on July 7, 1972, for possession of illegal drugs. At that time, the Internal Revenue Service served petitioner with a Notice of Termination of Taxable Period pursuant to Section 6851 and a Notice of Seizure pursuant to Section 6331 of the Internal Revenue Code of 1954, indicating that it was seizing his property in satisfaction of income taxes determined to be due for the terminated period in the amount of $6,458 (Pet. App. A, a4-a5).

The district court had dismissed a previous action filed by petitioner and his father to enjoin the Internal Revenue Service from selling the seized property and to compel an explanation of the basis for the seizure on the ground that it was barred by the Anti-Injunction Act, 26 U.S.C. 7421(a) (Pet. App. A, a5). Petitioner thereafter brought this action, claiming that the termination of his taxable year and seizure of his property were unjustified, that the procedures required with respect to jeopardy assessments under Section 6861 of the Code had not been followed, that he was not given proper notice and demand for payment, and that the Internal Revenue Service had improperly disposed of some of the seized items.[2] The

[2]The Internal Revenue Service determined that some of the property seized (an automobile and a guitar) belonged to others, and returned these items to those individuals. Petitioner claims that the guitar had been given to him, and that it should not have been returned to the alleged donor. He also objected to the fact that a sum of money, which allegedly consisted of a currency collection of sequentially numbered, uncirculated bills and silver certificates, was credited to the asserted liability only at face value (Pet. App. A, a8). At some point following the seizure of the property in question, the termination assessment was withdrawn, and a notice of deficiency was issued to the petitioner for 1972. Petitioner sought a redetermination of the asserted deficiency in the Tax Court. That action was terminated on the stipulation of the parties that there had been an overpayment of petitioner's taxes for 1972 in the amount of $2,893.15 (Pet. App. A, a5-a6).

district court dismissed petitioner's complaint for lack of subject matter jurisdiction, holding that a suit against federal employees for damages arising out of their official activities could be brought, if at all, only under 28 U.S.C. 1331 pursuant to an implied cause of action for redress of alleged constitutional violations. The district court further held that petitioner's complaint failed to state a Fourth Amendment violation. Since the Fifth Circuit had previously held in *Davis* v. *Passman*, 571 F. 2d 793 (1978), that no cause of action for damages could be implied under the Fifth Amendment due process clause, the district court ruled that petitioner's complaint failed to state any cognizable claim for damages[3] (Pet. App. A, a11-a21).

The court of appeals originally affirmed the decision on the basis of the district court's opinion (Pet. App. A, a1-a2). However, after this Court's decision in *Davis* v. *Passman*, 442 U.S. 228 (1979), holding that a cause of action for damages could be implied under the due process clause of the Fifth Amendment, the court of appeals on rehearing remanded the case to the district court for further consideration in light of that decision (Pet. App. B, b1).

Despite the fact that the court of appeals reversed the dismissal of his suit and remanded the case to the district court for further consideration in the light of *Davis* v. *Passman*, *supra*, petitioner seeks review of its decision on the ground that it leaves standing the district court's other jurisdictional holdings, which he contends are erroneous. But it is plain that review by this Court at this time would be inappropriate in light of the interlocutory nature of the

[3]The district court did not reach the question whether the federal defendants are immune from suit under *Butz* v. *Economou*, 438 U.S. 478 (1978).

judgment below. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 334-335, (1940); *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893). On remand, petitioner may prevail on the merits of his claim that the defendants' actions violated his Fifth Amendment rights and obtain the relief he seeks. Conversely, the federal defendants may establish that they are immune from suit under the standards of *Butz* v. *Economou*, 438 U.S. 478 (1978). In either event, there would be no reason to reach petitioner's challenge to the district court's other rulings. However, if the outcome of this suit ultimately turns on any of the other adverse rulings by the district court, petitioner could then seek review by this Court. The petition for a writ of certiorari is therefore premature.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980